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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 266.

JOSEPH ALCIDE LANDRY, *Petitioner,*

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

REPLY BRIEF FOR PETITIONER.

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On page 2 of their brief in opposition, counsel for respondent assert that the reference in our main brief to *Mutual Life Insurance Company of New York* v. *Drummond*, 111 F. (2d) 282 (C. C. A., 8th, 1940) is "utterly irrelevant." Judge McCord, as shown by his dissenting opinion in the court below, thought otherwise. We quote:

> "The giving of proof of disability was not a condition precedent to the accrual of the benefits, it was only a condition precedent to the enforcement of the rights accrued. This important distinction, and its force and effect, is ably discussed in *Boyett* v. *United States*, 5 Cir., 86 F. 2d 66, to which reference is here made, and in *Mutual Life Insurance Co.* v. *Drummond*, 8 Cir., 111 F. 2d 282, which involved policy provisions identical

with those considered here." (148 F. (2d), at p. 703; R. 97)

Nor did the court in the *Drummond case* "by way of *dicta*" or otherwise, "specifically * * * [approve] the general rule followed by the court in this case that the submission of proof before age 60 was a condition precedent the fulfillment of which was necessary to invoke the disability coverage even under those policies which made provision for retroactive benefits." (Brief for Respondent, p. 2) As will be seen from a reading of the opinion at 111 F. (2d), p. 286, the court merely quoted language from the opinion in *Birnbaum* v. *Mutual Life Ins. Co. of N. Y.*, 170 Misc. 83, 9 N. Y. S. 2d 928, as supporting its conclusion that liability for disability payments accrued as of the date when total disability commenced. Furthermore, the same court in an opinion delivered only four days thereafter, *Lincoln Natl. Life Ins. Co.* v. *Ghio*, 111 F. (2d) 307, 308, 310 (C. C. A., 8th, 1940) took pains to point out the distinction between cases where the rights of the insured are "made clearly dependent upon the insured's submitting proof" and those like the instant case and like the *Drummond case* where the furnishing of proof is "not a condition precedent to liability."

Counsel for respondent would summarily dispose of our petition for certiorari on the ground, among others, that there is "no decision by any United States Circuit Court of Appeals in conflict with the decision of the Circuit Court of Appeals below." * (Brief for Respondent, p. 2)

We submit that the decision below is in conflict with the decision of the Eighth Circuit Court of Appeals in the *Drummond case, supra.*

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* Counsel for respondent (p. 2 of their brief) have misinterpreted the statement on p. 14 of our main brief to the effect that the final interpretation of the rider clause in the Landry policy is *res novo.* All that was intended by our statement was to point out that the precise two sections of the rider in the Landry case have not been construed elsewhere,—and not that other courts have not passed upon similar language in life insurance contracts.

As stated in our main brief, p. 15, the disability clause in the policy involved in the *Drummond case* was "the same as that which is contained in the Landry policy." The only difference is that the second section of the rider there involved did not contain the words "due proof is received by the Company before the Insured shall have attained the age of sixty years" which appear in the second section of the rider (R. 65) here involved.

In the *Drummond case* the court held that the inclusion of the first section of the rider (as was the case here) making provision for payments beginning as of the date of commencement of disability, made the policy one in which the furnishing of proof was not a condition precedent to liability on the part of the insurance company. In the instant case, the majority of the court below held that the furnishing of proof was such a condition precedent.

In the *Drummond case*, the facts were that the premium due on a $5,000 policy was not paid when due (July 16, 1933), and that during the grace period, the insured requested that the amount of the policy be reduced to $1,000. The request was granted by the insurance company, and the policy was reduced to the amount stated as of July 16, 1933. On April 9, 1937, the insured furnished to the company proof that she had become totally and presumably permanently disabled on February 10, 1933, when $5,000 of insurance was in force. On the ground that the insured's right to disability benefits accrued on February 10, 1933, and that the furnishing of proof was not a condition precedent to liability, the court held that the insured was entitled to recover benefits under the $5,000 policy. Surely it would be "a distinction without a difference" to hold that the insured could recover in the *Drummond case*, where the original insurance was no longer in effect at the time when the proof was furnished, but that Landry cannot recover in the instant case, where all premiums were paid and where the policy was in full force and effect at the time when Landry filed his proof of claim.

It appears also that the decision of the court below is probably in conflict with *Viles* v. *Prudential Ins. Co. of America*, 96 F. (2d) 3 (C. C. A., 10th, 1938). In that case, as here, the policy contained a rider which provided that disability benefits would be granted as of the date when total disability commenced, even though proof was filed thereafter. The court held that "under the rider Viles was entitled to the disability benefits, including waiver of premiums, from the date of the commencement of total and permanent disability," and that the filing of proof prior to a date when the policy lapsed was not a *sine qua non* for recovery on the part of the insured. To the same effect see *Boyett* v. *United States*, 86 F. (2d) 66 (C. C. A., 5th, 1936) relied upon by Judge McCord in his dissenting opinion below.

As pointed out in our petition for a writ (p. 6), it is assumed that the disability clause and the rider here involved are contained in thousands of similar policies issued to policy holders over the country, and that consequently the matter of correct interpretation of the clause is one of great importance and general interest. At no place in their brief in opposition do counsel for respondent dispute our assumption. If our assumption is correct, as we believe it to be, ours is certainly not a case involving "an attempt to reargue a simple question of construction of a contract." (Brief for Respondent, p. 3)

Respectfully submitted,

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